Tan Sri Dato (Dr) Rozali Ismail & Ors v Gary Lim Ting Howe & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-106–01 OF 2013
MOHAMED ARIFF, MAH WENG KWAI AND DAVID WONG JJCA
14 FEBRUARY 2014

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Civil Procedure — Intervention — Application for — Application by creditor to intervene to annul order made under s 62 of the Mental Health Act 2001 — Patient a bankrupt — Whether applicant had locus standi — Whether applicant had legitimate interest to intervene — Rules of the High Court 1980 O 15 r 6(2)(b)

D

Mental Disorders and Treatment — Annulling proceedings — Application to annul order made under s 62 of the Mental Health Act 2001 — Challenging mental state of patient — Patient a bankrupt — Whether applicant creditor to be granted leave to intervene to annul order — Mental Health Act 2001 ss 55, 62 & 74

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The third respondent had obtained judgment in the sum of RM35,087,135.06 against the appellants in suit S2–1108 of 2007 ('the judgment'). The appellants paid the full judgment sum to the third respondent's solicitors on 28 February 2011. On 7 July 2011, the judgment was set aside by the Court of Appeal with an order of repayment made against the third respondent. The third respondent however failed to refund the judgment sum to the appellants. On 9 November 2011 the third respondent was adjudged a bankrupt. The third respondent subsequently obtained, in this suit, two orders dated 25 April 2012 and 27 April 2012 respectively under the Mental Health Act 2001 ('the Act') to the effect that the third respondent was mentally unfit to manage his affairs. The first and the second respondents were appointed to manage the third respondent's affairs. In view of the orders obtained, the committee applied for dispensation of further public examination of the third respondent pursuant to the bankruptcy. The appellants applied: (a) for leave pursuant to O 15 r 6(2)(b) of the Rules of the High Court 1980 to intervene in the proceedings; and (b) to set aside the orders made on 25 April 2012 and 27 April 2012 pursuant to s 62 of the Act. The learned judge dismissed the application to intervene. The appellants appealed against this decision. The appellants claimed that evidence obtained by a private investigator showed that the third respondent was seen 'doing his shopping, playing golf, having his car washed, attending at Pantai Hospital, travelling abroad and making phone calls'. Hence, the appellants wanted a chance to challenge the third respondent's 'mental status'. The

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respondents contended that the appellants' rights had been subsumed in the Director General of Insolvency due to the bankruptcy of the third respondent and hence the appellants did not have locus standi.

Held, allowing the appeal with costs:

(1) From the provisions of ss 55, 62 and 74 of the Act, it was quite clear that anyone with any information may seek remedy in court to challenge the status of mental state of the third respondent. With such clear provisions in a specific statute, the court was empowered to disregard the impediments alluded to by counsel for the respondents. The mental status of any person is a fluid matter and changes to it can and do occur as acknowledged by the Act itself (see para 21).

(2) Had the learned judge approached the issue of locus status of the appellants in the context of the Act, he would have concluded that the appellants had a legitimate interest to intervene in this suit. Justice and fair play in the context of this case demanded that the appellants be given a chance to question and challenge the mental status of the third respondent. The surveillance report on the third respondent by the appellants provided adequate reasons enough to grant leave to intervene (see para 22).

[Bahasa Malaysia summary

Responden ketiga memperolehi penghakiman dalam jumlah RM35,087,135.06 terhadap perayu dalam Guaman S2–1108 Tahun 2007 ('penghakiman'). Perayu-perayu membayar keseluruhan jumlah penghakiman kepada peguam cara responden ketiga pada 28 Februari 2011. Pada 7 Julai 2011, penghakiman diketepikan oleh Mahkamah Rayuan dengan perintah bayaran balik dibuat terhadap responden ketiga. Responden ketiga walau bagaimanapun gagal untuk membayar balik jumlah penghakiman kepada perayu-perayu. Pada 9 November 2011 responden ketiga diisytihar bankrap. Responden ketiga kemudiannya memperolehi, dalam tindakan ini, dua perintah masing-masing bertarikh 25 April 2012 dan 27 April 2012 di bawah Akta Kesihatan Mental 2001 ('Akta') yang memutuskan bahawa responden ketiga sakit mental untuk menguruskan hal ehwal dirinya. Responden pertama dan kedua dilantik untuk menguruskan hal ehwal responden ketiga. Mengambil kira perintah yang diperolehi, jawatankuasa memohon untuk pembahagian pemeriksaan awam selanjutnya terhadap responden ketiga berikutan kebankrapan tersebut. Perayu-perayu memohon: (a) untuk izin berikutan A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk campur tangan dalam prosiding; dan (b) untuk mengetepikan perintah-perintah yang dibuat pada 25 April 2012 dan 27 April 2012 berikutan s 62 Akta. Hakim yang bijaksana menolak permohonan untuk mencelah. Perayu-perayu merayu terhadap keputusan ini. Perayu-perayu mendakwa bahawa keterangan yang diperolehi oleh penyiasat persendirian

menunjukkan bahawa responden ketiga dilihat 'doing his shopping, playing golf, having his car washed, attending at Pantai Hospital, travelling abroad and making phone calls'. Maka, perayu-perayu hendak mencabar 'mental status' responden ketiga. Responden-responden berhujah bahawa hak-hak perayu-perayu telah diserap kepada Ketua Pengarah Insolvensi akibat kebankrapan responden ketiga dan maka perayu-perayu tidak mempunyai locus standi.

Diputuskan, menolak rayuan dengan kos:

(1) Daripada peruntukan-peruntukan ss 55, 62 dan 74 Akta, adalah jelas bahawa sesiapa dengan apa-apa maklumat boleh memohon remedi di mahkamah untuk mencabar status keadaan mental responden ketiga. Dengan peruntukan-peruntukan yang jelas di dalam statut yang spesifik, mahkamah diberi kuasa untuk tidak menghiraukan halangan yang dirujuk oleh peguam untuk responden-responden. Status mental seseorang adalah perkara yang boleh berubah dan perubahan kepadanya boleh dan berlaku seperti yang diakui oleh Akta itu sendiri (lihat perenggan 21).

(2) Sekiranya hakim yang bijaksana mendekati isu status locus perayu-perayu di dalam konteks Akta. Beliau akan memutuskan bahawa perayu-perayu mempunyai kepentingan sah untuk mencelah dalam guaman ini. Keadilan dan saksama dalam konteks kes ini memerlukan bahawa perayu-perayu diberikan peluang untuk menyoal dan mencabar status mental responden ketiga. Laporan pengawasan ke atas responden ketiga oleh perayu-perayu memperuntukkan alasan-alasan yang mencukupi untuk memberikan izin untuk mencelah (lihat perenggan 22).]

Notes

For cases on application for, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4521–4533.

Legislation referred to

Mental Health Act 2001 s 62
Rules of the High Court 1980 O 15 r 6(2)(b)

Appeal from: Suit No 24 NCVC-1018–04 of 2012 (High Court, Kuala Lumpur)

Ghazi Ishak (BE Teh and Fadzilah Pilus with him) (Teh & Associates) for the appellants.

Bastian Vendargon (Richard WG Lee and Harvinderjit Singh with him) (Richard Lee) for the respondents.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge dismissed the appellants' application to intervene in this originating summons.

[2] We heard the appeal and after due consideration to respective submissions of counsel, we allowed the appeal and now give our reasons.

FACTUAL BACKGROUND

[3] The third respondent had on 29 November 2010 obtained judgment in the sum of RM35,087,135.06 against the appellants in Suit S22–1108 of 2007 (High Court suit).

[4] Judgment under the High Court suit was not able to be stayed by the appellants resulting in the full judgment sum being paid to the third respondent's solicitors on 28 February 2011.

[5] On 7 July 2011, the appellants were successful in their appeal in the Court of Appeal resulting in the judgment in the High Court suit being set aside and with an order of repayment made against the third respondent by the Court of Appeal.

[6] However, the third respondent failed to make the necessary refund to the appellants.

[7] In view of the aforesaid failure, bankruptcy proceedings commenced against the third respondent and on 9 November 2011 the third respondent was adjudged a bankrupt.

[8] The first creditors' meeting was held on 9 February 2012 which resolved that the first public examination be conducted on 6 April 2012. However the aforesaid date was adjourned at the request of the solicitors of the third respondent on the ground that the third respondent was unwell.

[9] The public examination was then held on 26 April 2012, in which the

third respondent was examined by the officer of the Department of Insolvency, Selangor. The next fixed date for public examination was to be held on 14 May 2012.

[10] However, it became apparent unknown to anyone, the third respondent had obtained two orders dated 25 April 2012 and 27 April 2012 respectively under the Mental Health Act 2001 in this suit which in effect found the third respondent was prima facie to be mentally unfit to manage his affairs. A committee comprising of Gary Lim ('the first respondent') and Madam Loh Foi Fin ('the second respondent') was also appointed by the court to manage the third respondent's affairs. In view of the orders obtained, the committee applied for dispensation of further public examination of the third respondent.

[11] In view of the above developments, both the Director General of Insolvency and the appellants took out applications to set aside the order made under the Mental Health Act.

[12] The learned judge dismissed both applications on 14 December 2012. Appeals against the learned judge were lodged and it is these appeals we are now dealing with.

[13] At the commencement of the appeal hearing, counsel for the DGI informed the court that they are not pursuing the appeal and hence requested that their appeal be struck out which we duly did. This leaves us with the appeal of the appellants which we now deal with.

HIGH COURT DECISION

[14] The application by the appellants is encapsulated in the summons in chambers which pray for the following orders:

(a) Pursuant to O 15 r 6(2)(b) of the Rules of the High Court 1980:

  (i) that the abovenamed interveners be granted leave to intervene in these proceedings and be added as the second, third and fourth defendants respectively;

  (ii) that the title of this action be amended accordingly; and

  (iii) that such consequential orders or directions be given or made as this honourable court deems just or expedient.

(b) Pursuant to s 62 of the Mental Health Act 2001 (Act 615) and/or under the inherent jurisdiction of this honourable court:

  (i) That the orders of this honourable court made on 25 April 2012 and 27 April 2012 be set aside;

(ii) That such further or other orders or directions be made or given as this honourable court deems just and expedient.

(c) That the costs of and occasioned by this application be paid by the committee appointed under the order dated 27 April 2012.

[15] The learned judge's rationale in dismissing the summons in chambers can be gleaned from the following passages:

Locus standi

Mr B E Teh in addressing the court on 22 November 2012 did concede that the Pencelah (the Jcs) had no locus standi unlike KPI. Nevertheless he did address the court on 22 November 2012 and 13 December 2012 in support of encl 14. My finding is that the Pencelah lacked the locus to enable them to intervene.

Setting aside of perfected order

The law in regard to the setting aside of a perfected order is trite. The leading case on this subject is the Federal Court decision of *Badiaddin bin Mohd Mahadin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75. It states that final orders regularly obtained cannot be set aside unless the final order could be proved to be null and void on the grounds of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the Court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. See also *Tan Sri Dato Rozali Ismail (DR) v Kim Pang Cheing* [2012] 3 MLJ 458; [2012] 2 CLJ 849 @ 54 quoting Lord Denning MR in *Becker Noel & Anor* [1971] 1 WLR 803. It is my decision that there is no illegality. Neither did the court lack jurisdiction when it handed down the Order of 26 April 2012.

OUR GROUNDS OF DECISION

[16] It is the contention of the respondents that whatever the appellants' rights may have are subsumed in the DGI in view of the status of the third respondent as a bankrupt. And when the DGI abandoned his appeal, the appellants' locus standi evaporates with that decision of not appealing.

[17] The appellants' main grouse here is simply that the 'mental status' of the

third respondent is suspect to say the least in view of evidence to the contrary obtained from the appellants' own investigation. These contradictory evidence obtained by a private investigator are that the third respondent was seen 'doing his shopping, playing golf, having his car washed, attending at Pantai Hospital, travelling abroad and making phone calls'. In this application all they require from the court is simply to be given a chance to challenge that 'mental status'.

[18] The contention of the respondents set out above is on a cursory glance attractive to say the least in the context of this case.

[19] However we are attracted to the appellants' contention that where 'case law which closes the door to litigant who wishes to intervene on grounds of functus officio or that the order of court has been perfected, ought to give way to statutory direction'.

[20] Learned counsel refer the court to the following provisions:

Section 55

Power to send person alleged to be mentally disordered to a government psychiatric hospital or a gazetted private psychiatric for purpose of observation.

(1) The Court may, in lieu of or in addition to its powers under section 54, and on such evidence as it deems sufficient, make an order that the person alleged to be mentally disordered be admitted into a government psychiatric hospital or a gazetted private psychiatric hospital for observation for a period not exceeding one month; and the Court may on subsequent application by the Medical Director order an extension for a further period of observation not exceeding one month.

Section 62

Subject to this Act, the Court may, on an application made to it concerning any matter connected with an inquiry, make such order in respect of the application and the costs of the application and of the consequent proceedings as under the circumstances seem just but no order for costs shall be made under this section against any public officer.

Section 74

Annulling proceedings

(1) Where a person has been found to be incapable of managing himself and his affairs due to his mental disorder and it is subsequently shown to the Court —

(a) on the application of that person;

(b) on the application of a person acting on his behalf; or

(c) on the information of any other person.

that there is reason to believe that such incapability has ceased, the Court may make an order for an inquiry to determine whether the person is now capable of managing himself and his affairs.

[21] From the above provisions, it is quite clear that anyone with any information may seek remedy in court to challenge the status of mental state of the third respondent. With such clear provisions in a specific statute, the court is empowered to disregard the impediments alluded by learned counsel for the respondents. It must not be forgotten that the mental status of any person is a fluid matter and changes to it can and do occur as acknowledged by the Mental Health Act itself when it contains provisions set out earlier.

[22] We are in no doubt that had the learned judge approached the issue of locus status of the appellants in the context of the Mental Health Act, he would have concluded that the appellants have a legitimate interest to intervene in this suit. It is our view that justice and fair play in the context of this case demands that the appellants be given a chance to question and challenge the mental status of the third respondent. Whether the appellants succeed in their quest is of no concern to us at this juncture. The surveillance report on the third respondent by the appellants has provided us adequate reasons enough to grant leave to intervene.

CONCLUSION

[23] For reasons stated above, we allow the appeal, set aside the High Court's decision and grant the following orders:

(a) leave is granted to the interveners to intervene and be added as the second, third and fourth defendants respectively; and

(b) that title to this originating summons be amended accordingly.

In respect of costs, we award the sum of RM10,000 against the first respondent to be paid to the appellants.

Appeal allowed with costs.

Reported by Kanesh Sundrum